81-2167

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE SEEKONK WATER DISTRICT,
Petitioner,

v.

HERITAGE HOMES OF ATTLEBORO, INC.,
Respondent.

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

1. Whether a private corporation, which itself "has no racial identity," *Village of Arlington Hts.* v. *Metro. Housing Dev.*, 429 U.S. 252, 263 (1977), has standing under 42 U.S.C. §§ 1981, 1983 to sue based on racial discrimination directed at hypothetical potential purchasers of homes sold by the corporation.

2. Whether a municipal corporation can be held liable for damages under *Monell* v. *Dept. of Soc. Serv. of the City of N.Y.*, 436 U.S. 658 (1978), based solely on the actions and motivation of voters acting directly through a town meeting to decide a public issue.

3. Whether the *Monell* decision, which overruled *Monroe* v. *Pape*, 365 U.S. 167 (1961), applies retroactively.

PARTIES BELOW

At an earlier stage of this case, additional parties were present in the District Court and in the Court of Appeals. Those parties were Roger G. DesVergnes, Barbara R. Mann, Harold G. Devine, Jr. and Paul R. Tortolani. The only parties present in the District Court and Court of Appeals at the time of the trial and judgment sought to be reviewed are those listed in the caption to this petition.

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OPINIONS BELOW

The first opinion of the Court of Appeals was reported at 601 F.2d 9 (1979). The second opinion of the Court of Appeals was reported at 648 F.2d 761 (1981). The opinion of the Court of Appeals on remand from this Court was reported at 670 F.2d 1 (1982). The opinions of the District Court for the District of Massachusetts were reported at 448 F. Supp. 1256 (1978), 463 F. Supp. 686 (1979), and 498 F. Supp 463 (1980). All opinions are reproduced in the Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on January 25, 1982. A timely petition for a writ of certiorari was filed by the respondent on April 26, 1982. This conditional cross-petition was filed within 30 days of the filing of the respondent's petition under Rule 19.5 of the rules of the Court. Jurisdiction in this court is founded on 28 U.S.C. § 1254(1). Jurisdiction in the district court was founded on 28 U.S.C. § 1343.

STATUTES INVOLVED

United States Code, Title 42

§ 1981. Equal rights under the law.

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

§ 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

This case arises from the refusal of the Seekonk Water District in Massachusetts to include land owned by Heritage Homes in the district and the consequent refusal to provide municipal water services. Heritage purchased undeveloped

land in 1976 and petitioned for inclusion in the district. The petition was put on the agenda of a meeting of all district voters pursuant to Massachusetts law. Although about 13,500 people live in Seekonk, only 74 appeared and voted on the Heritage petition. It was defeated by a vote of 66 to 8.

In 1977, Heritage brought suit under the Federal Civil Rights Acts against the Seekonk Water District alleging that it had been damaged as a result of that vote[1]. The District Court dismissed the original complaint, which alleged claims under 42 U.S.C. §§ 1983, 1985 and the Fourteenth Amendment. 448 F. Supp. 1256, App. at 1a-14a. An amended complaint, asserting a claim under 42 U.S.C. § 1981, was also dismissed by the District Court. 463 F. Supp. 686, App. at 15a-16a. That Court held that a corporation was "not a member of any class traditionally protected by Section 1981." 463 F.Supp. at 686, App. at 15a.

The Court of Appeals reversed. 691 F.2d 9, App. at 17a-32a. Judge Wyzanski, siting by designation and writing for the court, construed the complaint as alleging that Heritage's petition for inclusion had been rejected by the Seekonk voters because a majority believed Heritage would sell the homes built by it to blacks, as it had in the past in developing property in North Attleborough, Massachusetts. While noting Mr. Justice Powell's observation that "a corporation has no racial identity and cannot be the direct target of an alleged discrimination," *Village of Arlington Hts.* v. *Metro. Housing Dev.*, 429 U.S. 252, 263 (1977), Judge Wyzanski concluded that Heritage had stated a cause of action under §§1981 and 1983. With respect to § 1981, the Court of Appeals held that "a person has an implied *right of action* against any other person who, with a racially discriminatory intent, interferes with his right to make contracts with non-whites. *A fortiori:* a person has an implied *right of action* against any other person who with a racially discriminatory intent, injures him because he made contracts with non-whites. Because Heritage comes within each of those two rules, it has statutory standing to sue." 601 F.2d at 14, App.

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[1] Roger DesVergnes, president of Heritage Homes, was also originally a plaintiff. He and three individual defendants were dismissed as a result of court rulings and agreement of the parties.

at 25a (emphasis in original). With respect to § 1983, the Court of Appeals held that a state, through a municipal corporation, may not "punish or discriminate against a corporation for its willingness, past or present, to make contracts with blacks." *Id* at 17, App. at 30a. Judge Wyzanski further concluded that the voters of Seekonk were analogous to "a body of stockholders of a private corporation," *id.* at 15, App. at 27a, and that the Water District could be held liable for the acts of the voters since those acts "may fairly be said to represent official policy" under the rule in *Monell* v. *Dept. of Soc. Serv. of City of N.Y.*, 436 U.S. 658, 694 (1978).

The case was remanded to the District Court where it was tried without a jury. During the two-day trial, evidence was presented regarding the purchase, development and sale of homes on the plaintiff's land. There was evidence of racial bias in the form of telephone calls from Seekonk residents to local officials. There was also evidence of certain community activity and proof of biased comments made by several voters at the water district meeting which supported an inference of racial bias; however, uncontradicted testimony showed that the officials of the water district recommended inclusion of plaintiff's property. Significantly, there was no evidence that any prospective purchaser of plaintiff's homes was deterred or precluded from purchasing by any acts of the water district or any voters. Indeed, a black family had purchased one of those homes. Heritage showed that it was able to build and sell its homes even though it was not included in the water district, although its costs were increased by drilling private wells.

The District Court, in an opinion written by Judge Caffrey, held that "the water district's refusal to include plaintiff's land within its boundaries was motivated solely by racial considerations." 498 F. Supp. at 467, App. at 39a. That court held that the increased costs to Heritage resulting from drilling private wells had been passed on to the purchasers and plaintiff, therefore, had suffered no compensable damages. The District Court did award plaintiff $100,000 in punitive dam-

ages. It also decreed that Heritage must be included in the district if it so wished.[2]

The Court of Appeals re-affirmed its prior decisions on the scope of §§ 1981 and 1983. It rejected Judge Caffrey's "passing on" analysis and directed entry of a compensatory judgment for plaintiff based on the difference between the cost of wells and the costs had plaintiff's land been included in the district. By a divided vote, with Judge Aldrich dissenting, the Court of Appeals affirmed the punitive damage award. 648 F.2d 761, App. at 42a-47a. This Court granted a petition for a writ of certiorari, vacated the Court of Appeals' judgment and remanded the case for further proceedings in light of the decision in *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. ____ (1981). *See Seekonk* v. *Heritage Homes*, ____U.S.____ (1981). On remand the Court of Appeals expressly limited its reconsideration to the punitive damage issue, set aside the judgment for punitive damages and reaffirmed its prior decisions in all other respects. 670 F.2d at 4, App. at 57a.

REASONS FOR GRANTING THE WRIT

Petitioner does not believe this case requires further review by this Court, for reasons set out in the Brief in Opposition to the Petition for Certiorari in No. 81-2058. If, however, that petition is granted, this cross-petition should be granted to review and decide the issues concerning the liability of municipal corporations under the Federal Civil Rights laws which are presented in this case and have not previously been decided by this Court. The issues raised in this cross-petition were also raised in the Water District's prior petition, No. 80-2172. Those issues were not addressed by the Court when it remanded the case, however, and are properly presented for review if respondent's petition is granted.

The first issue presented is the standing of private, profit-making corporations to sue under the Civil Rights laws because

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[2] Heritage's property has in fact been included in the district as a result of this litigation.

of acts resulting from discrimination directed at hypothetical customers. It is significant that no natural persons are parties to this suit. It is axiomatic that the Reconstruction Civil Rights laws were designed to end discimination and insure equality among natural persons. Yet here two legal creatures of the state have, in effect, litigated an allocation of business costs where there is no showing of any actual or potential discrimination against natural persons. If the decision below stands, developers who see a glint of discriminatory motive behind local government action will have a cause of action which, as in this case, could shift their development costs to the taxpayers.

The standing of a corporation to sue under § 1983 was explicitly left open by this Court in *Village of Arlington Heights, supra.* In that case, several plaintiffs including a non-profit corporate developer and a prospective Negro purchaser, challenged the zoning decisions of a municipality. Although the Court held that the corporate plaintiff had suffered an "injury in fact" and met the constitutional requirement for standing, it declined to decide whether the "prudential limitiations" on standing should be relaxed. Writing for the Court, Mr. Justice Powell stated: "As a corporation, MHDC has no racial identity and cannot be the direct target of the petitioners' alleged discrimination. In the ordinary case, a party is denied standing to assert the rights of third persons. *Warth* v. *Seldin,* 422 U.S., at 499. But we need not decide whether the circumstances of this case would justify departure from that prudential limitation and permit MHDC to assert the constitutional rights of its prospective minority tenants. See *Barrows* v. *Jackson,* 346 U.S. 249; cf. *Sullivan* v. *Little Hunting Park,* 396 U.S. 229; *Buchanan* v. *Warley,* 245 U.S. 60, 72-73. For we have at least one individual plaintiff who has demonstrated standing to assert these rights as his own... Because of the presence of this plaintiff, we need not consider whether the other individual and corporate plaintiffs have standing to maintain the suit." *Village of Arlington Heights, supra,* at 263 and n.9.

The Court of Appeals in this case held, through an extension of *Sullivan, supra,* that Heritage had standing to

challenge a municipal decision which was allegedly based on the belief of some voters that it would sell homes to blacks or had done so in the past. Petitioner submits that the decision below is an unwarranted extension of *Sullivan*. In that case, a white citizen leased a home to a Negro and the community organization refused to permit assignment of pool privileges to the Negro tenant. The white owner was then expelled from the organization. This Court held that the white plaintiff had standing under 42 U.S.C. § 1982 "to vindicate the rights of minorities protected by § 1982." *Id.* at 237.

Ordinarily, plaintiffs are not permitted to assert the rights of third parties. *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975). That prudential limitation is particularly applicable in this case where there is no evidence that the rights of minorities were in fact injured. In effect, Heritage has shown that some of the voters of the Water District had a bias against blacks, but it has not shown that any blacks were in fact injured or threatened with injury because of the district's failure to include Heritage's land. The consequences of non-inclusion were felt by all purchasers of homes from Heritage, whether black or white. Thus, the interests injured were not those of minorities protected by §§ 1981 or 1983, but only those of Heritage, a corporate entity which cannot be the object of racial discrimination.[3]

The second issue presented is the decision below that a municipal corporation can be held liable if a court concludes that the vote of a small number of local citizens was racially motivated. This decision raises significant issues left open in prior decisions on municipal liability and touches directly on First Amendment freedoms. In *Monell* the Court specifically rejected any vicarious liability for municipal corporations based solely on the misfeasance of employees. That decision was based on the legislative intent behind § 1983 and a concern that imposition of such liability would raise constitutional concerns. *Id.* at 691-93. In this case, the Seekonk Water District has been held liable solely because of the acts of some voters. There is no evidence that any official of the water district acted with any

[3] All of the stock of Heritage is owned by Roger DesVergnes. He is of French, German and Canadian Indian extraction.

discriminatory intent, purpose or effect.[4] It would be ironic indeed for municipal corporations to be held liable for the acts of the voters over whom the corporation can exercise no control whatsoever, when there is no municipal liability for the malfeasance of individual employees whom the corporation can control.

The principal adopted below infringes directly on First Amendment rights. In this case, only 66 people voted against inclusion of the Heritage tract.[5] The evidence showed that even fewer voters spoke on the issue at the town meeting. There is testimony about the specific comments of only 2 or 3 persons who spoke. Based on their comments and testimony concerning acts of Seekonk residents before and after the meeting, the District Court held that the water district's refusal to include Heritage's land was racially motivated.

Evidence of motivation is, of course, illusive. But the mind-reading involved in this case necessarily puts the judiciary directly in the center of political action in its purest form. The Court of Appeals did not cite any precedent for basing governmental liability on the acts of the voters, relying instead on an analogy to corporate-shareholder relationships. The analogy is superficially attractive but it overlooks the constitutional rights that attend voting.

The dangers inherent in basing liability on voters' intentions are similar to the concerns which underlie the doctrine of legislative immunity. In *Tenney* v. *Brandhove*, 341 U.S. 367 (1951) the Court reviewed the doctrine and re-affirmed its status under federal law. The Court itself noted that "the holding of this Court in *Fletcher* v. *Peck*, 6 Cranch 87, 130, that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned." *Tenney, supra*, at 377. Citing *Tenney*, the District Court here had held that the votes and conduct at the meeting "do not provide a basis for holding the District vicariously

[4] To the contrary, the records show that the officials of the water district were overruled by the voters.

[5] Two votes were taken at subsequent meetings on renewed motions to include the Heritage tract. Those motions lost by votes of 12-13 and 56-86.

liable." 448 F.Supp. at 1263, App. at 11a. Those concerns about separation of powers and integrity of the legislative process warrant similar concern over judicial scrutiny of voters' motivation. The novel decision of the Court of Appeals warrants review by this Court before it becomes the opening wedge of judicial intrusion into the polling booth.

Finally, if respondent's petition is granted, the Court should decide whether the decision in *Monell, supra,* applies retroactively to cases filed before that decision. Since *Monell* explicitly overruled *Monroe* v. *Pape,* 365 U.S. 167 (1961), it is a candidate for nonretroactive application under the principles discussed in *Chevron Oil Co.* v. *Huson,* 404 U.S. 97, 105-07 (1971). The impact of retroactive liability for municipal corporations is of sufficient importance to justify giving *Monell* prospective effect only.

Consideration of this issue in the lower courts is quite limited, but there is a divergence in the two reported opinions. In *Aiello* v. *Wilmington,* 470 F.Supp. 414 (D.C. Del. 1979), aff'd on other issues 623 F.2d 845 (3d Cir. 1980), the District Court held that *Monell* had retroactive effect, applying the *Chevron* doctrine. In *Sala* v. *Suffolk,* 604 F.2d 207 (2d Cir. 1979), vacated and remanded for reconsideration, 446 U.S. 903 (1980), the Court of Appeals, analogizing their decision to *Chevron,* held that municipal corporations had an immunity from liability where they acted in "good faith" when the case law at the time of the challenged acts did not suggest the conduct was unlawful.

We recognize that this issue of retroactivity was neither raised nor decided below and that this Court will not normally consider issues raised here for the first time. *See, e.g., United States* v. *Lovasco,* 431 U.S. 783, 788, n. 7. But that practice is not an absolute bar to considering such issues. In "exceptional circumstances," this Court will consider issues which were neither raised nor decided below. *See R. Stern & E. Gressman, Supreme Court Practice,* § 6.27 at 458-61.

CONCLUSION

For reasons set forth in the Opposition to the Petition for Certiorari in No. 81-2058, petitioner does not believe further review by this Court is appropriate. However, if that petition is granted, the issues raised here are equally worthy of review and this petition should also be granted.

Respectfully submitted,

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